Court No.2
Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Writ Petition No. 244 of 2004 (M/S)

M/s Rapti Contractors, near Head Office
Mool Dhar New Tehri Town Uttaranchal
through its partner Shri Y.P.Singh.

..... Petitioner

Versus

1. Union of India through its Secretary,
   Ministry of Finance, Govt. of India, New Delhi.

2. The executive Engineer, Dehradun,
   Central Division-II C.P.W.D.
   20 Subhash Rod, Dehradun.

..... Respondents

Sri S.K.Jain, learned counsel for the petitioner
Sri Alok Singh, learned senior Advocate for the respondents.

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Dated: April 5, 2006
Hon'ble P.C.Verma, J.
Hon'ble J.C.S. Rawat,J.

(Delivered by Hon'ble P.C.Verma, J.)

This petition has been filed by the petitioner seeking writ of certiorari quashing the impugned order dated 16.03.2004 passed by respondent No.2 (Annexure No. 13 to the writ petition). A further prayer is made that the respondent No. 2 be directed to take complete measurement of the entire work done by the petitioner including excavation in hard rock (which may be got determined by the expert of I.I.T. (Roorkee).

2. Brief facts of the writ petition are that M/s Rapti Contractors is a partnership firm registered under the Registrar of firm at Lucknow. Sri Y.P.Singh and V.P.Singh sons of late Shri Bharat Singh are the partners of the said Firm. Sri Y.P.Singh being the partner of the Firm is authorized to file the present writ petition on behalf of Firm. The aforesaid Firm is a Government contractor registered as 'A' class contractor in the department of opposite party. Vide contract agreement No. 70/eE/DCD-II/2000/2001 dated 31.3.2002, the petitioner Firm was given a contract for the work of construction of road from S.O.S. Mess to Kart Mackenzy Road at I.T.B.P. campus Mussoorie. The tenders were invited by the opposite party for the said work. The tender for the applicant for the said work was the lowest, which was accepted by opposite party No.2, vide his letter No. 54 (304)/D.K.M.-2/700 dated 12-3-2001. In pursuance of the aforesaid letter an agreement was executed on 31.3.2002 between the parties and signed by Shri V.P.Singh, one of the partner of said Firm and the opposite party No.2 – Executive Engineer Central Division-II C.P.W.D. (Dehradun). The total cost of the work was estimated as Rs. 1,99,52,510.00. The work was to be completed in 18 months (between the period 22.3.2001 to 21.9.2002 and later on the time was extended from time to time with the consent of both the parties. The petitioner had started the work within a stipulated time in the agreement i.e. 22.3.2001.

3. The petitioner made all the arrangement to complete the work in stipulated period. The work is in full swing at present to the satisfaction of the respondent

and more than 75% of the work was completed. During the working under the contract agreement, certain important dispute cropped up due to breach of the contract on the part of the respondent which resulted in serious financial loss to the petitioner. These matters were referred to the respondent with the request that the claims of the petitioner be settled mutually and amicably but no action was taken by him. Thereafter the petitioner requested the opposite party for appointment of Arbitrator according to the arbitration clause 25 in general conditions of the contract which is the part of the agreement. When the opposite parties neither settled the dispute nor appointed the Arbitrator according to the terms and general conditions of the contract/agreement dated 31.3.2002 there was no option before the petitioner except to take the recourse of law.

4. Thereafter on 30.10.2003 the petitioner moved an application under Section 11 (6) of the Arbitration and Conciliation Act before this Court for appointment of Arbitrator which was registered as arbitration Case No.18 of 2003 M/s Rapti Contractor versus the Chief Engineer, C.P.W.D. and others. The said application was finally disposed of on 7.11.2003 by this Court appointing Mr.Justice Ashok A.Desai, Former Chief Justice, High Court of Uttaranchal as an arbitrator. Vide letter dated 19.11.2003 by the arbitrator, the arbitral proceedings were started and were going on. In compliance of letter dated 19.11.2003 of the Arbitrator, the petitioner send a letter to the arbitrator on 8.12.2003 alongwith a cheque of Rs. 50,000/- towards the fees and other expenses.

5. It is important to mention here that during the arbitral proceedings before the Arbitrator, Shri S.P.Singh, Chief Engineer, vide his letter dated 5.12.2003 appointed Shri A.K.Singhal, New Delhi as an Arbitrator to settle the dispute between the parties. The said order is totally illegal and without jurisdiction. The respondent moved review application before this court bearing No. 10699 of 2003 to review the order dated 7.11.2003 passed in Arbitration Case No. 18 of 2003, M/s Rapti Contractors versus the Chief Engineer and others. The review application was rejected on 30.12.2003 by this Court. Again on 16.02.2004 the so-called Arbitrator Shri A.K. Singhal served a letter to the parties requiring them to appear before him for arbitral proceedings. The petitioner immediately informed, vide his letter dated 04.03.2004 to Shri A.K.Singhal that his appointment is non est in the eye of law and his action in entering to the reference is illegal and should refrain from proceedings any further in this matter. The respondent in a most illegal and improper way sent a letter dated 23.2.2004 and letter dated 10.3.2004 to the petitioner giving threat to the petitioner to take action under sub clause 3 (a) and/or 3(b) and/or 3(c) of the contract agreement. The time for completion of work was extended time to time and by letter dated 23.2.2004 it was extended till 31.3.2004. More than 95% of the work has since been completed. The petitioner again brought to the notice of the respondent through letter dated 14.3.2004 that because the entire matter is pending and sub judice before the sole Arbitrator Mr.Justice Ashok A.Desai so any further action with this regard taken by the respondent shall be illegal and without jurisdiction.

Through letter dated 23.2.2004 the respondent has extended time upto 31.3.2004 for completion of the work by the petitioner and without any reason by illegal and arbitrary act rescinded the contract agreement by order dated 16.3.2004.

6. In the counter affidavit filed by the respondents it is alleged that the petitioner entered into a contract dated 12.3.2001. According to the terms of the contract, the time for executing the work covered under the contract was the essence of the contract. Since the contractor himself has not performed the work covered under the contract in accordance to its stipulations, it would have automatically resulted into the recession of contract. According to the contract, the work was to be started by the petitioner from 22.3.2001 and according to the schedule of time given, the same was to be completed within a period of 18 months ending on 21.9.2002 but he was unable to complete the work in accordance to the specifications. The petitioner assured the respondents for completing the work by 24.5.2003 and again assured to complete the work by 28.7.2003. As the progress of work was unsatisfactory the respondent No.2 issued a show cause notice to the petitioner which was in continuation to the earlier show causes calling upon for speedy work under contract failing which it was proposed that the action as contemplated under the contract for recession will be taken against the petitioner. Despite the show cause notice the petitioner has not made any endeavors to complete the work within the agreed period or thereafter within the extended period as agreed upon, hence the respondents were left with no option except to

issue notices for show cause to the petitioner. The show cause notices were issued to the petitioner on 29.6.2001, 18.7.2001, 22.8.2001, 21.2.2002, 4.7.2002, 29.5.2003, 23.8.2003 and 23.2.2004. The respondents further provided last opportunity as a chance to the petitioner to complete the work. In response thereof the petitioner submitted a letter dated 4.3.2004 giving an undertaking of completing the work by 20.4.2004. The revised programmme was not accepted by the Engineer-in-Charge and the intention of non-acceptance was convey to the petitioner vide respondents' letter dated 23.2.2004. In this letter the respondent No.2 directed the petitioner to complete the work by 31.3.2004 but again he failed to achieve the progress as per the mile stones submitted by him.

8. We have heard the learned counsel for the parties and have gone through the material available on record. The main contention of the learned counsel for the petitioner is that the cancellation order has been passed without any cause and without giving any reasonable opportunity to the petitioner. Further it can be said that it has been passed on the ground of malafide. It is not disputed between the parties that it was a business contract and they are bound by the terms and conditions of the contract. The impugned order, contained in Annexure -13 to the writ petition, is an order passed by the Executive Engineer, Dehradun Cent. Divn. No.I, C.P.W.D., Dehradun in terms of Clause-3 of the contract agreement dated 31.03.2002, which reads as under:-

"GOVERNMENT OF INDIA
CENTRAL PUBLIC WORKS DEPARTMENT

NO.: 54(304)/DCD I/774 Dated 16.3.04

To

M/s Rapti Contractor,

Govt. Contractor,

I.T.B.P. Academy Area,
Spring Road, Mussoorie.

Sub.: C/o Raod for SOS Mess to Kart Mackanzy at I.T.B.P. Campus, Mussoorie (SH: C/o Road from chainage O to 3134 I/c C/o Culverts disposal of excavated earth/rock and retaining walls for disposal of earth (Balance work).

Agreement No. 70/EE/DCD II/2000-01

Dear Sir(s)

Whereas under clause 3 of aforesaid agreement the Engineer-in-charge shall have powers to take action under one or more of the sub-clause 3(a), 3(b) & 3(c) in the event of delay or suspension in the execution of the aforesaid work by the contractor so that in the opinion of the Engineer-in-charge (which shall be final and binding) the contractor have already failed to complete the work by the extended date of completion whereas you have suspended the execution of the aforesaid work and as per the opinion of the undersigned, the Engineer-in-charge (which is final and binding) you have already failed to complete the work by extended date of completion and, whereas you were served with a show cause notice in this regard under this office No. 54 (304)/DCD.I./774 dt. 23.02.2004 & 1014 dt. 10.03.2004 which has not been replied to the satisfaction of the Engineer-in-charge by the date of specified in the show cause notice, therefore under powers delegated to me under sub clause 3(a), 3(b) & 3(c), Sh.Rajendra Singh, the Engineer-in-charge for the aforesaid work under the aforesaid agreement, for and on behalf of the President of India, hereby,

(a) Rescind the contract as aforesaid upon which rescission your security deposit stands absolutely forfeited to the Government, and

(b) Undertake to employ labour paid by the CPWD and to supply materials to carry out the work/part of the work debiting your

accounts with the cost of the labour and the price of the materials (the amount of cost price certified by the Engineer-in-charge shall be final and conclusive against you) and crediting your account with the value of work done in all respect in the same manner and at the same rates as if it has been carried out by yourself under the terms of your contract provided that if the expenses incurred by the department are less than the amount payable to you at your agreement rate, the difference shall not be paid to you and

(c) Take out such part of the work out of your hand, as remains unexecuted, for giving it to another contractor to complete the same in which case any expenses which may be incurred in excess of the sum which would have been paid to you if the whole work had been executed by you in terms of the agreement (the amount of excess certified in writing by the Engineer-in-charge shall be final and conclusive) shall be borne and paid by you on demand/ or may be deducted from any money due to you by Government under this contract or any other contract whatsoever or from security deposit or the proceeds of sales thereof or a sufficient part thereof as the case may be without prejudice to the right of the Government to realize said excess amount by suit or otherwise. You are also hereby served with notice to the effect that the work executed by you will be measured up on 25.03.2004 for which you are asked to attend for joint measurement failing which the work will be measured by the department unilaterally in your absence and result of measurement will be final and will be binding on you.

This is without prejudice to Governments right to take action under any other clause or sub-clause of the agreement and to realize Government dues and losses and damages whatsoever under such clauses or sub clauses.

Your faithfully
Sd/- Er.Rajendra Singh
Executive Engineer,
Dehradun Cent.Divn.No.I,
C.P.W.D., Dehradun."

9. From the perusal of the aforesaid order it is clear that the order has been passed on account of violation of terms of the agreement and before passing of the aforesaid order as show cause notice was given to him on 23.02.2004 requiring him to show cause why the petitioner had failed to complete the work by the extended date of completion. Therefore, in exercise of powers delegated to the Engineer-in-charge under the aforesaid agreement he passed the impugned order for the reasons stated in the order.

10. Since the order has been passed in terms of a purely business contract in accordance with the terms and conditions of the contract, which is not a violation of any statutory rule or any statutory provision of law. therefore, the dispute raising a challenge is purely private dispute and the petitioner cannot avail the public law remedy under Article 226 of the Constitution of India. Petitioner has other forums and in fact the dispute is subject to arbitration proceedings, we decline to interfere with the impugned order.

11. The writ petition is dismissed accordingly. No order as to costs.

(J.C.S.Rawat,J.) **(P.C.Verma,J.)**

Dated: April 5, 2006
P.Singh